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Supreme Court, U.S.
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Docket No. _____

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

October Term, 1996

In re, JESSIE D. MCDONALD,

Petitioner

On application for Writ of Habeas Corpus to the State of Tennessee

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PETITION FOR WRIT OF HABEAS CORPUS

For the Petitioner:

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18 pp

The Petitioner, Jessie D. McDonald respectfully request this Court to consider and review the following questions:

1. Whether this Court is immune from due process requirements that are imposed upon lower federal courts ?

2. Whether the petitioner was denied the right to a fair trial ?

3. Whether the petitioner had proper notice of the charges against him, in the indictment ?

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OPINIONS BELOW

February 21, 1989, this Court entered an order, directing the clerk of this court,not to accept any applications for extraordinary relief, from Jessie D. McDonald unless, the required fee is paid by him. [Appendix,p. 18-33]

May 13th., 1975, the Court of Criminal Appeals for Tennessee, issued its judgment and opinion, reversing the conviction and setting aside the sentence of three (3) years in the Tennessee State Penitentiary; [Appendix,p. 46-66]

January 19th., 1976, the Tennessee Supreme Court, issued its opinion and reversed the judgment of the appellate court, for reasons, other than constitutional issues.

[Appendix, p. 34-45]

BASIS FOR JURISDICTION

This Court entered a judgment against the petitioner, which was based on bias and prejudice by the majority justices who based their decision on matters outside the record that was not before the Court;

The petitioner was convicted of a crime, not charged in the indictment and he did not have proper notice of the charges against him, to allow a proper defense against the indictment;

On February 21st., 1989 this Court entered its judgment, barring the petitioner from proceeding in forma pauperis for extraordinary relief; No Motion to Rehear was filed;

On January 19th.,1976, the Tennessee Supreme Court rendered a judgment reversing the opinion of the Court of Criminal Appeals; Motion to Set Aside

Conviction, in the Tennessee Supreme Court was denied.

This Court has jurisdiction under Title 28, §§1651(a) and 2241(a) of the United States Codes.

CONSTITUTIONAL PROVISIONS

Fifth Amendment to the U.S. Constitution

" No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due

process of law; nor shall private property be taken for public use, without just compensation."

[Emphasis added to pertinent section]

Sixth Amendment to U.S. Constitution

" In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense".

[Emphasis added to pertinent section]

Fourteenth Amendment to U.S. Constitution

[Rights of Citizens]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner, Jessie D. McDonald was brought to trial, after signing a written waiver to have an attorney, under an indictment that alleged the charge " Obtaining Property by False Pretense (clear and unincumbered title to a 1972 Ford LTD automobile was alleged to be the property)", but the jury's verdict was based on the property being the 1972 Ford, LTD automobile, rather than the "Title".

[Appendix,Indictment, P.67-69]

At the conclusion of the trial, the jury delivered a guilty verdict and the trial judge proceeded to sentence the petitioner to a term of Three(3) years in the Tennessee State Penitentiary; and allowed the petitioner to remain free on the present bond, pending the perfection of an appeal to the Court of Criminal Appeals, within the allowed thirty(30)

days.

May 13th.,1975, the Court of Criminal Appeals reversed the conviction and vacated the three(3) year sentence; and the state sought certiorari to the Tennessee State supreme court, which was granted.

The Tennessee Supreme Court, on January 19th., 1976, proceeded to reversed the appellate court's judgment, and proceeded to reinstate the conviction and sentence of the trial court; A Motion to Set Aside the Conviction, was the first instant , to raise the federal question, that petitioner had been convicted of a crime not charged in the indictment, which was denied and the Motion for Stay was granted , which allowed McDonald to remain on his bond, pending a timely filing of the application for writ of certiorari to this Court, which was

ultimately denied.

Near May 4th., 1976 McDonald was placed in the custody of the warden at the Tennessee State Penitentiary to began serving the three (3) year sentence and was released from physical custody on December 7th., 1977, and the sentence expired on May 7th., 1979.

A petition for writ of habeas corpus was filed in this Court and this Court responded on February 21st., 1989 and denied the application and further instructed the clerk of this court, not to accept any further applications for extraordinary relief,without the payment of $300.00 filing fee.

In compliance with Rule 14(1)(g)(i), petitioner states that the Court of Criminal Appeals opinion, held that the defendant was convicted of a crime, not charged in the indictment.

REASONS WHY THE WRIT SHOULD BE GRANTED

This application for writ of habeas corpus, is in aid of this Court's appellate jurisdiction, and exceptional circumstances warrant the exercise of this Court's discretionary powers and adequate relief cannot be obtained in any other form or from any other court.

On February 21st., 1989, this court denied an application for leave to proceed in forma pauperis and further instructed the clerk of the court, not to accept any further applications for extraordinary relief, without the fee of $300.00, which has never been done in any other case, against any other citizen of the United States. There has never been a definition presented by the court, as to what constitute an abuse of applications. There has never been a limit of applications that a citizen can make, in a request for

relief. The majority vote was 5-4 and it is clear that the five justices that constituted the majority was bias and prejudice against the petitioner. In case, Walker v. United States, 116 F.2d 458, the court of appeals for the ninth circuit defined bias and prejudice as a term which can be urged against a judge,that must be based upon something other than rulings in the case, citing a previous U.S. Supreme Court decision, Berger v. United States, 255 U.S. 22, 31; 41 S.Ct. 230, 232; 65 L.Ed. 481. In the case at bar, this court relied on the fact, the petitioner had filed numerous petitions and appeals to this court, which had nothing to do with the petition that was before the court. In the instant case, the petitioner is not required to state the facts as the judgment in Berger v. United States,Id., because the opinion clearly state the

facts, which show the petitioner has filed over 100 actions in this court's clerk office and fail to show any legal basis for entering such an opinion. The petitioner is a citizen and a part of these United States of America, and unless and until Congress or this Court defines the term abuse, there is no basis for such a judgment being entered.

THIS CASE PROVIDES THIS COURT WITH AN OPPORTUNITY TO CORRECT A MIS-CARRIAGE OF JUSTICE.

The supreme court did not review the whole case as it was presented to the appellate court, and proceeded with trickery to reinstated the conviction and sentence after reviewing a part of the issues.

It is clear, the state supreme court allowed deception and trickery to enter into its decision to review this case,

only in part and not the whole case as it was presented at the trial level and on appeal. In fact, the judgment of the state supreme court does not reflect to the truth in this case and its entire opinion is the fruits of falsehood and deception for the following reasons:

First, the time frame that was mentioned in the state supreme court cannot reflect to the truth because, there is no way any individual could obtain a title to any automobile at that time and continue to make changes day after day, under the time frame of the State of Tennessee, through the Department of Revenue, which issues the title , which took approximately four weeks; and secondly, the petitioner had possession of the 1972 Ford LTD, nearly eight months before the prosecution began. Further, the appellate court stated in the dissenting opinion, as well as the state

supreme court final judgment, that petitioner made oath that his address was the same as the credit union, which is untrue and cannot be supported by the record. There is nothing in the record to support the dissenting judge's view, that a false statement was provided to the representatives of the credit union, to obtain the loan. Also, it is clear that because of the trickery, the petitioner was prepared to defend against the indictment, which alleged the property to be a "title" and when the jury based its verdict on the property being the "72 Ford LTD automobile", which came at the end of the trial, even an attorney could not defend against charges that was not known, until after the trial was over. Conviction upon a charge not made or without evidence of guilt is a denial of due process of law. Thompson v. City of Louisville, 362

U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654.

However, the chain of ownership of the vehicle as shown in the state courts judgments, pretty much describes the procedure the petitioner has always purchased his vehicles. In fact, since the prosecution, and in January of 1993, the petitioner made a purchase of a Cadillac, Brougham De Elegance, through Julie Roberts, a Salesperson employed by Crest Cadillac, in Nashville (who has since been transferred to the Rivergate Lot) and that automobile was valued at approximately 10 times the value of the automobile in the indictment, which was a cash transaction [no checks or money orders was involved]. The automobile was sold to the petitioner and at the conclusion of the sale, the automobile was placed in the name of McDonald Enterprises which shows the owner of the business to be Jessie D. McDonald,

II, the petitioner's oldest son, who is employed by Vanderbilt Hospital in Nashville and his social security number is 410-27-4517.

The manner that the petitioner purchase his vehicles may be different from other individuals, but there is nothing illegal, nor fraudulent involved in the business transactions and the only reason this prosecution was initiated is based solely on the fact, a racial conflict commenced between the petitioner and a board member of the credit union.

The state supreme court reinstated the original conviction, based on the theory and interpretation of state law, that the owner of the property must rely on the false representation, to part with his property. However,in the instant case, there was never an allegation in the indictment, that alleged the owner of the

automobile relied on any false representation from the petitioner, to place the automobile in the petitioner's possession, as required under state law and in this case. In fact,the alleged property was already in the possession of the petitioner, pursuant to a valid contractual agreement between the Credit Union and the petitioner, which was never in dispute during the trial, nor alleged that the contract was the fruits of fraud.

Finally, if the facts in this case, cannot support a reversal of the conviction on the merits, petitioner request this Court to issue audita querela to expunge this matter from his record, on grounds, this conviction has prevented him from being excepted into law school and will certainly prevent him from practicing law.U.S. v. Javanmard, 767 F.Supp. 1109 (D.Kan.,1991). In support of this request,

the petitioner states that he has lived a productive life since this conviction, with the exception of a misdemeanor assault and battery charge in 1981, which resulted after defending himself against two Nashville cab drivers and has earned a bachelors degree in Civil Engineering from Tennessee State University, in August of 1995 in Nashville and completed 16 hours of graduate studies in the Criminal Justice major, with a grade point average of 3.2, in a joint program with Tennessee State University and Middle Tennessee State University and is presently enrolled at Tennessee State University, seeking a Master's Degree in Administration Supervision and has completed 18 hours, with a 3.83 grade point average and is expected to be excepted into Vanderbilt-Peabody Graduate School to complete the requirements for a Doctorate Degree in

Administration Supervision in August of 1997. Petitioner further states that, this conviction occurred in 1973 and is not likely to re-occur. The petitioner is unmarried, but was married once, for 15 years and raised three sons from the marriage, whom are all grown.

CONCLUSION

The petitioner has shown this Court, that , he has been subjected to "personal bias and prejudice" by five members of this court, who rendered the opinion in this case, based on matters outside the record of the case at bar and cited over 100 previous filings of frivolous cases to support its judgment, In re, McDonald, 109 S.Ct. 993 (1989), in which Justice Brennan, Justice Marshall, Justice Blackmun and Justice Stevens dissented. The bias and personal prejudice by the

five justices of this Court, was based solely on the fact, the petitioner can be described as a constant litigant because he had filed over 100 applications to this Court and there is no laws, nor part of the constitution that deny a citizen the right to seek redress, when he believes, that he is entitled to it. The petitioner is aware of the fact, he has a right to submit an affidavit charging the majority justices with personal bias, which is attached hereto, and under a previous decision of this Court, in case Berger v. United States, 255 U.S. 22, 31; 41 S.Ct. 230, 232; 65 L.Ed. 481, the five justices that wrote the opinion in case, In re McDonald,Id, cannot participate in this proceeding and must retire from this case.

Relief Sought

Wherefore, the Petitioner, Jessie D. McDonald, pray this Court to set aside the conviction and issue all orders necessary to expunge the matter from his record; and further set aside the judgment that was entered on February 21st., 1989; and all other and further relief the Court deems proper.

Respectfully submitted,

s/Jessie D. McDonald

AFFIDAVIT OF BIAS AND PREJUDICE

I, Jessie D. McDonald, after first being duly sworn to, in accord with the laws of Tennessee, states that the majority of the justices in this Court acted with bias and prejudice to enter the judgment against me on February 29th., 1989 ,in case, In re McDonald, 109 S.Ct. 993, 489 U.S. 180, 103 L.Ed. 2d 158(1989) and under Docket No. 88-5890, by basing

their judgment on matters outside the record of the case at issue.

In support of their decision, the Court stated: " Petitioner is no stranger to us. Since 1971, he has made 73 separate filings with the Court, not including this petition, which is his eighth so far this Term. These include 4 appeals, 33 petitions for certiorari, 99 petitions for extraordinary writs, 7 applications for stays and other injunctive relief and 10 petitions for rehearings". The Court proceeded and stated that: " The instant petition for a writ of habeas corpus arises from petitioner's 1974 state conviction for obtaining title to a 1972 Ford LTD automobile under false pretenses, for which he was sentenced to three years imprisonment." and it is this same case, that is before this Court, in this application.

Under penalty of perjury, I state that the facts stated herein are true.

s/Jessie D. McDonald

APPENDIX

Orders Entered	Page[s]
U.S. Supreme Court Opinion;	18-33
Tennessee Supreme Court Opinion;	34-45
Court of Criminal Appeals Opinion;	46-66
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UNITED STATES SUPREME COURT JUDGMENT

IN RE McDONALD
cite as 109 S.Ct. 993 (1989),
489 U.S. 180;

PER CURIAM

Pro se petitioner Jessie McDonald requests this Court issue a writ of habeas corpus pursuant to 28 U.S.C. §2241(a). He also requests that he be permitted to proceed in forma pauperis under this Court's Rule 46. We deny petitioner leave to proceed in forma pauperis. He is allowed until March 14, 1989, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with this Court's Rule 33. We also direct the Clerk not to accept any further petitions from petitioner for extraordinary writs pursuant to 28 U.S.C. §§ 1651(a), 2241, and 2254(a), unless he pays the docketing fee required by Rule

45(a) and submits his petition in compliance with this Court's Rule 33. We explain below our reasons for taking this step.

Petitioner is no stranger to us. Since 1971, he has made 73 separate filings with the Court, not including this petition, which is his eighth so far this Term. These include 4 appeals, 33 petitions for certiorari, 99 petitions for extraordinary writs, 7 applications for stays and other injunctive relief and 10 petitions for rehearing. Without recorded dissent, the Court has denied all of his appeals and denied all of his various petitions and motions. We have never previously denied him leave to proceed in forma pauperis.

The instant petition for a writ of habeas corpus arises from petitioner's 1974 state conviction for obtaining a 1972 Ford LTD automobile under false pretenses,

for which he was sentenced to three years imprisonment. Petitioner appealed to the Tennessee Court of Criminal Appeals, which reversed his conviction on the ground that there was no evidence that the alleged victim relied on petitioner's false statements. In January 1976, the Supreme Court of Tennessee reinstated his conviction. State v. McDonald, 534 S.W. 2d 650. We denied certiorari, 425 U.S. 955, 96 S.Ct. 1733, 48 L.Ed. 2d 200 (1976), and rehearing denied, 425 U.S. 1000,96 S.Ct. 2219, 48 L.Ed. 826(1976).

In the 13 years since his conviction became final, petitioner has filed numerous petitions and motions for relief in this Court and in the Tennessee courts, all of which have been rejected. In the instant petition, for example, he requests that the Court "set aside" his conviction and direct the State to "expunge" the

conviction "from all public records." He is not presently incarcerated. He contends that his constitutional rights were violated by the State's failure to prove that the property to which he obtained title under false pretenses was valued at over $100, as required by the statute under which he was convicted. Petitioner has put forward the same argument - unsuccessfully - in at least four prior filings with the Court, including a petition for mandamus, which was filed 13 days before the instant petition and was not disposed of by the Court until more than a month after this petition was filed.

Title 28 U.S.C. § 1915 provides that "[a]ny court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein,

without prepayment of fee's and costs or security therefor." (Emphasis added) As permitted under this statute, we have adopted Rule 46.1, which provides that "[a] party desiring to proceed in this Court in forma pauperis shall file a motion for leave to so proceed, together with his affidavit in the form prescribed in Fed. Rules App. Proc. Form 4 ... setting forth with particularity facts showing that he comes within the statutory requirements." Each year, we permit the vast majority of persons who wish to proceed in forma pauperis to do so; last Term, we afforded the privilege of proceeding in forma pauperis to about 2,300 persons. Paupers have been an important - and valued - part of the Court's docket, see, e.g., Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799(1963), and remain so.

[1,2] But paupers filing pro se petitions are not subject to the financial considerations - filing fees and attorney fees - that deter other litigants from filing frivolous petitions. Every paper filed with the Clerk of this Court, no matter how repetitious or frivolous, requires some portion of the institution's limited resources. A part of the Court's responsibility is to see that these resources are allocated in a way that promotes the interests of justice. The continual processing of petitioner's frivolous requests for extraordinary writs does not promote that end. Although we have not done so previously, lower courts have issued orders intended to curb serious abuses by persons proceeding in forma pauperis. Our order here prevents petitioner from seeking extraordinary

writs from the Court. It is perhaps worth noting that we have not granted the sort of extraordinary writ relentlessly sought by petitioner to any litigant - paid or in forma pauperis - for at least a decade. We have emphasized that extraordinary writs are, not surprisingly. "drastic and extraordinary remedies", to be "reserved for really extraordinary causes," in which "appeal is clearly an inadequate remedy." Ex Parte Fahey, 332 U.S. 258, 259, 260, 67 S.Ct. 1558, 1559, 91 L.Ed. 2041 (1947).

Petitioner remains free under the present order to file in forma pauperis requests for relief other than an extraordinary writ, if he qualifies under this Court Rule 46 and does not similarly abuse that privilege.

It is so ordered.

Justice BRENNAN, with whom Justice MARSHALL, Justice BLACKMUN, and Justice STEVENS join, dissenting.

In the first such act in its almost 200 year history, the Court today bars its door to a litigant prospectively. Jessie D. McDonald may well have abused his right to file petitions in this Court without payment of the docketing fee; the Court's order documents that fact. I do not agree, however, that he poses such a threat to the orderly administration of justice that we should embark on the unprecedent and dangerous course the Court charts today.

The Court's denial not just of McDonald's present petition but also of his right to file for extraordinary writs in forma pauperis in the future is, first of all, of questionable legality. The federal courts are authorized by 28 U.S.C. §1915 to permit filings in forma pauperis.

The statute is written permissively, but it establishes a comprehensive scheme for the administration of in forma pauperis filings. Nothing in it suggests we have any authority to accept in forma pauperis pleading from some litigants but not from others on the basis of how many times they have previously sought our review. Indeed, if anything, the statutory language forecloses the action the Court takes today. Section 1915(d) explains the circumstances in which an in forma pauperis pleading may be dismissed as follows: a court "may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." (Emphasis added). This language suggests an individualized assessment of frivolousness or maliciousness that the Court's prospective order precludes. As one lower court has

put it, a court's discretion to dismiss in forma pauperis cases summarily "is limited ... in every case by the language of the statute itself which restricts its application to complaints found to be frivolous or malicious." Sills v. Bureau of Prisons, 245 U.S. App. D.C. 389, 391, 761 F.2d 792, 794(1985) (emphasis added). Needless to say, the future petitions McDonald is barred from filing have not been "found to be" frivolous. Even a very strong and well founded belief that McDonald's future filings will be frivolous cannot render a before-the-fact disposition compatible with the individualized determination §1915 contemplates.

This Court's Rule 46 governs our practice in cases filed in forma pauperis. No more than §1915 does it grant us authority to disqualify a litigant from

future use of in forma pauperis status. Indeed, Rule 46.4 would seem to forbid such a practice, for it specifies that when the filing requirements described by Rule 46 are compiled with, the Clerk "will file" the litigant's papers" and place the case on the docket. Today we order the Clerk to refuse to do just that. Of course we are free to amend our own rules should we see the need to do so, but until we do we are bound by them.

Even if the legality of our action in ordering the Clerk to refuse future petitions for extraordinary writs in forma pauperis from this litigant were beyond doubt, I would still oppose it as unwise, potentially dangerous, and a departure from the traditional principle that the door to this courthouse is open to all.

The Court's order purports to be motivated by this litigant's

disproportionate consumption of the Court's time and resources. Yet if this filings are truly as repetitious as it appears, it hardly takes much time to identify them as such. I find it difficult to see how the amount of time and resources required to deal properly with McDonald's petitions could be so great as to justify the step we now take. Indeed, the time that has been consumed in the preparation of the present order baring the door to Mr. McDonald far exceeds that which would have been necessary to process his petitions for the next several years at least. I continue to find puzzling the Court's fervor in ensuing that rights granted to the poor are not abused, even when so doing actually increases the drain on our limited resources. Cf. Brown v. Herald Co., 464 U.S. 928, 104 S.Ct. 331, 78 L.Ed. 2d 301(1983) (BRENNAN, J.,

dissenting). Today's order makes sense as an efficiency measure only if it is merely the preclude to similar orders in regard to other litigants, or perhaps to a generalized rule limiting the number of petitions in forma pauperis as individual may file. Therein lies its danger.

The Court's order itself seems to indicate that further measures, at least in regard to this litigant, may be forthcoming. It notes that McDonald remains free to file in forma pauperis for relief other than extraordinary writs, if he "does not similarly abuse that privilege." Ante, at 966. But if we have found his 19 petitions for extraordinary writs abusive, how long will it be until we conclude that his 33 petitions for certiorari are similarly abusive and bar that door to him as well? I am at a loss to say why, logically, the Court's order

is limited to extraordinary writs, and I can only conclude that this order will serve as precedent for similar actions in the future, both as to this litigant and to others.

I doubt - although I am not certain - that any of the petitions Jessie McDonald is now prevented from filing would ultimately have been found meritorious. I am most concerned, however, that if, as I fear, we continue on the course we chart today, we will end by closing our doors to a litigant with a meritorious claim. It is rare, but it does happen on occasion that we grant review and even decide in favor of a litigant who previously had presented multiple unsuccessful petitions on the same issue. See, e.g., Chessman v. Teets, 354 U.S. 156, 77 S.Ct. 1127, 1 L.Ed. 2d 1253(1957); see id., at 173-177, 77 S.Ct. at 1136-1138 (Douglas,J., dissenting).

This Court annually receives hundreds of petitions, most but not all of them filed in forma pauperis, which raise no colorable legal claim whatever, much less a question worthy of the Court's review. Many come from individuals whose mental or emotional stability appears questionable. It does not take us long to identify these petitions as frivolous and to reject them. A certain expenditure of resources is required, but it is not great in relation to our work as a whole. To rid itself of a small portion of this annoyance, the Court now needlessly departs from its generous tradition and improvidently sets sail on a journey whose landing point is uncertain. We have long boasted that our doors are open to all. We can no longer.

For the reasons stated in Brown v. Herald Co., supra, I would deny the petition for a writ of habeas corpus

without reaching the merits of the motion to proceed in forma pauperis. For the reasons stated above, I dissent from the Court's order directing the Clerk not to accept future petitions in forma pauperis for extraordinary writs from this petitioner.

TENNESSEE SUPREME COURT JUDGMENT

State of Tennessee
v
Jessie D. McDonald,
citing 534 S.W.2d at 650,
January 19, 1976; Reh.den.
March 15,1976;Cert.Denied,
April 26,1976, 96 S.Ct. 1733

OPINION

HENRY, Justice.

We granted certiorari in this case to consider the single question of whether the reliance of the victim upon the false representation or pretense is necessary to sustain a conviction under Section 39-1901,T.C.A.

We respond in the negative.

I.

[1] Respondent was convicted upon an indictment which charged that he obtained from the county court clerk of Davidson County a clear and unencumbered title to a 1972 Ford LTD automobile which was

encumbered by a lien in favor of Purity Dairies Employees Federal Credit Union, by falsely and fraudulently representing that a lien in favor of the credit union upon the automobile had been released and that it was free of encumbrances.

Respondent's approach was incredibly ingenious and remarkably bold.

Under the name of Jessie D. McDonald, he applied for and received a loan from the credit union to finance the purchase of a new automobile. Upon closing he executed a note and security agreement. He then volunteered to take the documents downtown and apply for a certificate of title. This was the triggering false representation, and the credit union with astonishing credulity and naivete relied upon him.

The next day he presented himself at the County Court Clerk's office, using the

name Jessie D. McDonald,II, and applied for a title certificate. In doing so he falsely and fraudulently gave his own address as the address of the credit union, with the result that the title was issued and mailed to the lien holder at respondent's address.

Subsequently, using the name of Jessie D. McDonald,II, he assigned the title to his father, Jessie D. McDonald,Sr. Two days thereafter, posing as Jessie D. McDonald,Sr. he presented himself at the County Court Clerk's Office and applied for a certificate of title. The certificate tendered to the clerk indicated that the vehicle had been sold to McDonald,Sr. and contained a notarized release of the lien, with the credit union's name stamped thereon. He made affidavit that the vehicle was free of encumbrances.

In order to avoid the sales tax, he executed an affidavit that the automobile was a gift from his son. In connection with the transfer of the license plates, he swore that Jessie D. McDonald and Jessie D. McDonald,Sr. were one and the same. This was true; all McDonalds were one and the same.

Subsequent to this he received a notice that payment was due and he wrote the credit union advising that his loan had been paid in full; that there was no lien on the automobile, and that he was no longer the owner.

This prosecution ensued.

II.

Our review has been limited to the narrow issue of whether the victim must rely upon the false representation to support a conviction under the statute.

Section 39-1901,T.C.A. originated in

Chapter 23 of the Public Acts of 1829 and Chapter 48 of the Public Acts of 1841 - 1842.

To our knowledge the first case construing these enactments is McCorkle v. State, 41 Tenn. 333 (1860). The Court declared the ingredients of the offense to be "obtaining the goods by false pretenses and with an intent to defraud." The Court made this significant comment:

> As was said by Lord Kenyan (3 Term Rep. 103), the statute creating this offense describes it in terms extremely general. It seems difficult to draw the line, and to sat to what cases it shall extend; and therefore we must see whether each particular case, as it arises, comes within it. 41 Tenn. at 336, 337.

[2-4] This conclusion reached more than a century ago continues to be valid. Not even a statute creating a criminal offense can spell out the specifics with mathematical certainty and, indeed,

absolute precision is not required. Both common law concept and constitutional due process are satisfied when the statute informs all citizens as to what the state commands or forbids, and outlines the prescribed conduct with reasonable certainty. Its terminology must give fair warning, Raley v. Ohio, 360 U.S. 423, 70 S.Ct. 1257, 3 L.Ed.2d 1344(1959), and must not be a trap for the innocent. United States v. Cardiff, 344 U.S. 174, 73 S.Ct. 189, 97 L.Ed. 200(1952). Section 39-1901 meets these standards.

A significant recent case is Beck v. State, 203 Tenn. 671, 315 S.W.2d 254 (1958). There , thee Court adopted the holding of State v. Morgan, 109 Tenn. 157, 69 S.W. 970(1902) and reiterated that the elements of the offense of violating the statute on false pretenses are:"(1) the pretense,(2) the falsity of the same, (3)

the felonious and fraudulent intent, (4) the description of the property, and (5) the reliance of the victim upon the representation." (Emphasis supplied). The state in brief correctly characterizes the fifth element (reliance) as dictum in view of the fact that the false representation was made by beck directly to the victim, hence the Court was under no necessity to address this requirement. In, Morgan, the Court passing upon the validity of the indictment, merely analyzed it under five headings, one of them being "reliance" of the victim. Again the Court did not directly address the necessity for reliance.

The latest pertinent pronouncement of this Court was in Mullican v. State, 210 Tenn. 505, 360 S.W.2d 35(1962) wherein the Court enumerated the elements of the offense thusly:

> [T]he false representation made must be representation of a past or existing fact, whether it be oral or written words or conduct, which is calculated to deceive, or intended to deceive, and does as a matter of fact deceive; and by means of which, by doing these things, the person who does it obtains something of value from the person injured without proper compensation.
> (citations omitted).

... under this statute the intent to defraud is the gravamen or an essential element in the crime. 210 Tenn. at 511, 360 S.W.2d at 38.

Dicta aside, the courts of this state have never held that the reliance of the victim is an element of the offense proscribed in Section 39-1901. Indeed, there is an analogous line of cases to the contrary. As a matter of fact, Beck, supra, correctly treats as settled law that it is not necessary that the representation must be calculated to deceive a man of ordinary prudence and

caution. As pointed out in 12 Vanderbilt L.Rev., pages 1134, 1135 in commenting upon this phrase of Beck. "Regardless of its merits or demerits in tort law, it would seem strange indeed to let the necessity of such reliance remain in the law of crimes to work a kind of estoppel against victims of false pretenses who may be deficient in astuteness and vigilance in favor of the perpetrators thereof . . ." Would it not be equally strange to establish as a part of our law that the reliance of the victim is an essential element of the offense of obtaining money or property under false pretenses?

It is obvious that there must be reliance by someone, but in this modern day and age when fraud and deceit are practiced with sophistication and ingenuity a narrow construction such as this would be tantamount to a judicial

conference of the proverbial "license to steal."

[5,6] We hold that the reliance of the victim is not an essential element of the offense "false pretense" as defined in Section 39-1901 T.C.A. We hold that our statute is satisfied, in this respect, when the person to whom the false representation is made or the false token or counterfeit letter is offered, relies upon the same to the ultimate detriment of the victim.

An excellent line of reasoning is contained in Commonwealth v. Johnson, 167 Ky. 727, 181 S.W. 368(1916) [According to their own case of State v. Higgins, 148 Tenn. 609, 256 S.W. 875(1923) the Kentucky statute is remarkedly similar to ours].

The Court said:

> The statute does not require that the false statement should be made to any particular person, or that it should be with the intention of committing a fraud upon the person to whom the false statement was made. The offense is committed when the false statement is made, with the intention to commit a fraud, and money or property is thereby obtained.
>
> * * * * * *

The purpose of the statute is to punish the perpetrators of fraud committed through any false pretense. The gist of the offense is the successful misrepresentation, regardless of the person to whom it was made. (Emphasis supplied). 181 S.W. at 370.

The judgment of the trial court is reinstated; that of the Court of Criminal Appeals is

Reversed.

FONES, C.J., and COOPER, BROCK and HARBISON,JJ., concur.

OPINION ON PETITION TO REHEAR AND MOTIONS

HENRY,Justice.

The petition to rehear is respectfully denied.

The motion to set aside the conviction is respectfully denied.

The motion for stay pending application to the Supreme Court of the United States for certiorari is granted, providing the petition is timely filed. Pending the filing and disposition of said petition, the judgment of this Court will be stayed and defendant may remain upon his present bond.

COURT OF CRIMINAL APPEALS OF TENNESSEE

NASHVILLE, SEPTEMBER 1974 TERM

JESSIE D. McDONALD,
Plaintiff in Error

v.

STATE OF TENNESSEE,
Defendant in Error

Docket No. B-317

DAVIDSON COUNTY

Hon. Allen R. Cornelius, Trial Judge

(Obtaining Property by False Pretense)

For Plaintiff	For Defendant
Jessie D. McDonald, Pro se Nashville, Tennessee	Milton P. Rice, Attorney General of Tennessee
	William C. Koch,Jr. Assistant General Nashville,Tenn.
	Robert H. Schwartz, Assist. District Attorney General Nashville, Tenn.

OPINION FILED: May 13, 1975

REVERSED AND REMANDED
W. WAYNE OLIVER, Judge

OPINION

The defendant was tried and convicted under the third count of the indictment. In essence that count charges that, with the intent to defraud a named credit union (from whom he borrowed money to buy a car), he obtained from the county court clerk a clear and unencumbered title to a $3150 Ford LTD automobile upon which the credit union had a lien, by falsely and fraudulently representing to the county court clerk that the credit union had released its lien and the car was unencumbered "with the fraudulent and felonious intent to deprive (the credit union) of its personal property and thereby caused (the county court clerk)to rely on said false and fraudulent representation and to deliver said unencumbered title to said automobile to the said defendant, . . . "(Emphasis

supplied).

Thus, that count of the indictment does not charge that the defendant made any false representation to the credit union which owned the lien and was a victim, nor does it charge that the credit union relied upon any representation by the defendant. Instead, the indictment charges that the false and fraudulent representation was made to the county court clerk and that he relied on it and issued to the defendant an unencumbered title to the automobile. So, the question immediately arises whether the third count of the indictment charges a violation of TCA §39-1901, upon which this prosecution is based.

The trial judge read that statute to the jury, and stated the elements essential to constitute a violation of it

exactly as they are set forth in Beck v. State, 203 Tenn. 671,675, 315 S.W. 2d 254 wherein the Court said: "Those elements are (1) the pretense, (2) the falsity of same, (3) the felonious and fraudulent intent, (4) the description of the property, and (5) the reliance of the victim upon the representation." (Emphasis supplied). In Beck, the prosecutor was bilked of $7,000 in money which he turned over to the defendants upon their false and fraudulent representation that they would arrange for him to purchase a large quantity of whisky which the sheriff had confiscated and which the court had ordered sold. Thus, the fraudulent representation was made directly and personally to the owner of the money, he was the victim and turned his money over to them in reliance upon what they said.

In Mullican v. State, 210 Tenn. 505,

360 S.W. 2d 35, it is emphasized that the person claiming to have been injured by the defendant's false and fraudulent representation must have parted with his property in reliance thereon, that by his false and fraudulent pretenses the defendant induced the party sought to be wronged to part with his property; and that the statute is not violated if the person claiming to have defrauded parts with his property in reliance on the advice of others and not on the defendant's representations.

After stating the essential ingredients necessary to constitute a violation of TCA §39-1901, as above noted, the trial court went on to say to the jury:

> ". . . and the obtaining of the goods or money by false pretense and with intent to defraud; <u>and if the false pretense created the credit, it is within the the statute.</u>
>
> " You will note from the reading of

Section 39-1901 of the Code above mentioned, that the law prohibits the obtaining of property by means of false pretense. Likewise, you will note the same law prohibits the obtaining of possession, intending at the time of receiving the property to feloniously steal the same. It is the State's theory that the defendant had this intention and that he further demonstrated this intention at a subsequent date by obtaining a clear and unencumbered title to a 1972 Ford LTD automobile.Of course, it is for you, the jury, to determine what the intention of the defendant was at the time of obtaining possession of the title to a 1972 Ford LTD automobile, and it is for you to determine, if in fact, the State has proved that this defendant did in fact, obtain the title to a 1972 Ford LTD automobile and if this fact sheds any light upon your determination of the issue of guilt in the initial obtaining possession of said property." (Emphasis supplied).

Upon the record there can be no dispute that the trial court was confused as to whether the defendant was charged with obtaining credit by false pretenses and as to whether the credit union's "property" mentioned in the indictment referred to the automobile. It is likewise clear that the jury also considered that the

"property" involved was the automobile, for when they reported to the court after deliberation that they found the defendant guilty of receiving property by means of false pretenses and that they found the value of the property to be more than $100, there was a colloquy between the trial judge and the jury foreman in which the latter inquired if the jury had authority to fix the sentence at less that three years. The court replied that they could not fix the sentence at less than three years. The court replied that they could not do so if they found the value of the property over $100, and the foreman replied, "A 72 LTD is valued over a hundred dollars."

At any rate, it is unquestionable that the third count of the indictment upon which the defendant was convicted does not charge a violation of TCA §39-1901. He did

not obtain the automobile from the credit union, and there is no charge or proof that he feloniously and fraudulently made any false pretense or representation to the credit union in obtaining the loan. Upon the face of the indictment and upon the record, his only false and fraudulent representation was made to the county court clerk, and that official believed and relied upon his false statement that the credit union had released its lien on the car and issued to him a clear title to it.

Whatever crime the defendant committed, it was not obtaining property by false pretense in violation of that statute. He was, therefore, convicted of a crime not charged in the indictment. Such a conviction cannot stand. Criminal prosecutions cannot be sustained by intendment, but everything necessary to

constitute the offense must be charged. Church v. State, 206 Tenn. 336, 333 S.W. 2d 799; Huffman v. State, 200 Tenn. 487, 495, 292 S.W. 2d 738; Clark v. State, 197 Tenn. 67, 270 S.W. 2d 361. See, also: 21 Am. Jur. 2d., Criminal Law §226, p. 265. Conviction upon a charge not made or without evidence of guilt is a denial of due process of law. Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed. 2d 654.

Accordingly, the judgment of the trial court is reversed and this case is remanded thereto for further proceedings not inconsistent with this opinion.

W. Wayne Oliver,
Judge

Concur:
Mark A. Walker,
Presiding Judge;

(SEE DISSENTING OPINION)
Charles H. O'Brien,
Judge;

DISSENTING OPINION

A jury verdict was returned in the Davidson County Criminal Court finding the defendant guilty of obtaining property valued over one hundred dollars under false pretenses. The judgment of the trial court fixed punishment at three years in the State Penitentiary. On this appeal the majority have reversed the trial court judgment. I am not in accord with the views expressed in the majority opinion. The indictment against defendant was returned at the January, 1973, term of court. The conclusion of the matter has been considerably delayed because of defendant's refusal to accept the services of trained and competent counsel. He declined appointment of an attorney in the trial court and acted as his own counsel. At May, 1974, term of this court at

Nashville defendant was endeavoring to proceed by petition for certiorari to the trial court to dismiss the indictment and judgment against him. He appeared on his own behalf. The panel considering the matter enjoined him to procure counsel. He stated his understanding in open court that counsel would be provided for him upon proof of indigence, but refused the services of appointed counsel because he preferred to represent himself. It appears defendant has filed five or six proceedings in the U.S. District Court; has appealed to the Sixth Circuit Court of Appeals and the U.S. Supreme Court at least once; has been twice before this court, and has filed at least one proceeding in State Supreme Court, all involved with these charges.

Defendant has made numerous assignments of error on this appeal by the first of

which he charges the trial court erred in bringing him to trial on the 17th., day of January, 1974, before the case was remanded back to the state court from the federal courts.

Preliminary to trial defendant brought to the attention of the trial judge that he had filed proceedings to remove the action to district court, and suggested any action the state court might take would be void. The trial judge proceeded with the trial, stating that the district court as well as the Sixth Circuit Court of Appeals had dismissed defendant's action in those courts.

There is nothing else in the record, of which we may take cognizance, indicating removal of these proceedings to the United States District Court. While the motions and pleading of various sorts which have been filed by the defendant are

multifarious, the law is clear that in order to make extraneous matters a part of the record, they must be examined by the trial judge and authenticated by his signature in such a manner as to make their identity certain. Parts of a Bill of Exceptions may be in the form of exhibits to be inserted in their proper place, according to the directions given therein; but all of the Bill of Exceptions, whether one or more documents, must be presented and examined when it is signed by the judge, and the several papers to be copied must be so marked as exhibits that no mistake in their identity can be made. If any extrinsic matters, which can only be made part of the record by Bill of Exceptions, appear in the transcript without proper authentication they cannot be considered by this court. Chico v. State, 217 Tenn. 19, 394 S.W. 2d 648, and

cited cases.

Defendant says he was brought to trial without any authority of law. This assignment as well as the third, to the effect that there was no evidence presented to the court to sustain conviction of a charge of obtaining property under false pretenses, seems to be an attack on the weight and legal sufficiency of the evidence.

In this case the State's evidence, supported by appropriate exhibits, was that on October 2nd., 1972, defendant made a loan from the Purity Dairies Employees Federal Credit Union in the amount of three thousand one hundred fifty dollars ($3,150.00) to purchase an automobile. He volunteered to record the appropriate papers. On October 3rd., 1972, he made application for title to the automobile. In doing so he made oath to the

application in which he allowed the address of the credit union to appear on the application as the same as his own residence. He took title in the name of Jessie McDonald II. On December 9th., Jessie McDonald,II assigned title to the automobile to Jessie D. McDonald,Sr., whose address, according to the instrument was the same as his own. The notary who took his acknowledgement was personally acquainted with him, and recalled the occurrence. The same instrument included a discharge of lien which had been acknowledged on December 7th., 1972. This discharge of lien had the legend, "Purity Dairies Empl. Fed. Cred. Union," stamped at the place on the instrument where the lienor's signature should have been. On December 11th., 1972, Jessie D. McDonald Sr. made application for title to the automobile and made oath that the vehicle

was free from any encumbrances. In the process of this registration he made two additional affidavits, one, to the effect that the automobile was a gift from his son, and the other, for the purpose of transferring license plates, that Jessie D. McDonald and Jessie D. McDonald,Sr. were one and the same person. On January 6th., 1973, in response to a notice from the credit union that his payments were in arrears, defendant advised the credit union representative by letter that his loan had been paid in full, and there was no lien on the automobile in question, and that he was no longer in possession of the automobile, nor the owner of it. The proof clearly shows Jessie D. McDonald, Jessie D. McDonald,II and Jessie D. McDonald,Sr. to be one and the same person in these transactions.

There is no doubt that this evidence

fully warranted the verdict of the jury, and clearly preponderated in favor of the correctness of the verdict and against the innocence of the defendant.

By his fourth assignment, defendant charges error to the trial court in refusing to quash, or dismiss the indictment against him.

The indictment contains three counts. On order of the trial court the State elected to go to trial on the 3rd. count which charged:

"Jessie D. McDonald, heretofore, to wit, on the _____of December, 1972, with force and arms, in the County aforesaid, unlawfully, feloniously and fraudulently, and with the felonious intent to defraud one Purity Dairies Employees Federal Credit Union, a federally chartered credit union did obtain from Robert E. Worrall, County Court Clerk or his agent or deputy, clear and unincumbered title to a 1972 Ford LTD automobile of the value of three thousand one hundred fifty ($3,150.00) Dollars, said automobile being at the time incumbered by a lien in favor of Purity Dairies Employees Federal Credit Union, a federally chartered credit union by means of a certain false pretense then and there

made by said Jessie D. McDonald, to said Robert E. Worrall, County Court Clerk, or his agent or deputy, whereby said Jessie D. McDonald falsely and fraudulently represented as follows: that a lien in favor of the said credit union on said automobile had been released by said credit union and that there were no incumbrance on said automobile which representation was false and untrue and was made by said defendant with the fraudulent and felonious intent to deprive said Purity Dairies Employees Federal Credit Union, a federally chartered credit union of its personal property and thereby cause the said Robert E. Worrall to rely on such false and fraudulent representation and to deliver said unincumbered title to said automobile to the said defendant, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State of Tennessee."

The indictment clearly made out an offense under the statute, (T.C.A., Section 39-1901), and sufficiently apprised defendant of the charges made against him in order that he could prepare his defense and be secure against the initiation of further proceedings against him for the same offense. The false pretense began when defendant offered to

record the security agreement and allied papers involved in securing the loan which set out that he granted to Purity Dairies Employees Federal Credit Union a security interest in one 1972 Ford LTD, 2 door hardtop, serial number 2U68S127257 to secure the payment of a note in the sum of $3,150.00. His felonious and fraudulent intent became manifest upon making application for title to the automobile in which he made oath that his address and that of the credit union were one and the same. He carried out the intent by transferring title to the automobile to himself, while in the process releasing the lien securing the victim, Purity Dairies Employees Federal Credit Union in the amount of $3,150.00, under their security agreement. The representative of the credit union relied upon the representations of defendant that he would

properly record the instruments protecting their interest. As stated in the majority opinion, fraudulent representation was made directly and personally to the representative of the credit union, who was the owner of the money, and who turned over the money to him in reliance upon what he said.

There are other assignments in one of which defendant complained the trial court refused to dispose of an amendment to his motion for new trial. The amendment was filed in erroneous reliance on the rules of civil procedure. The motion came after the trial court lost jurisdiction of the case by virtue of defendant's appeal. Defendant says it was error to allow the guilty verdict to stand after doubt existed in the jury's verdict. At the trial the jury returned a verdict of guilty and then expressed some reluctance

to assess a penalty of three years for the offense. After proper instructions from the trial judge they returned to their deliberations and subsequently fixed the penalty at no more than three years in the penitentiary. The verdict of the jury was properly returned. Whether or not to direct a verdict addresses itself to the sound discretion of the trial court. Carmon v. State, _____Tenn. Cr. App. _____ , 512 S.W. 2d 595.

A thorough review of this record and the evidence introduced at trial makes it clear that the judgment of the trial court should properly have been affirmed.

CHARLES H. O'BRIEN, JUDGE

INDICTMENT

THIRD COUNT

JANUARY TERM OF THE CRIMINAL COURT, 1973;

The Grand Jurors for the State of Tennessee, duly elected, impaneled, sworn, and charged, to inquire for the body of the County of Davidson and State of Tennessee aforesaid, upon their oath aforesaid, presents:

That Jessie D. McDonald heretofore, to wit, on the _____day of December, 1972 with force and arms, in the County aforesaid, unlawfully, feloniously and fraudulently, and with the felonious intent to defraud one Purity Dairies Employees Federal Credit Union, a federally chartered credit union, did obtain from Robert E. Worrall, County Court Clerk or his agent or deputy, clear and unincumbered title to a 1972 Ford LTD, automobile of the value of Three Thousand-

One Hundred Fifty ($3,150.00), said automobile being at the time incumbered by a lien in favor of the Purity Dairies Employees Federal Credit Union, a federally chartered credit union, by means of a certain false pretense then and there made by said Jessie D. McDonald to said Robert E. Worrall, County Court Clerk or his agent or deputy whereby said Jessie D. McDonald falsely and fraudulently represented as follows: that a lien in favor of said credit union on said automobile had been released by said credit union and that there were no incumberances [sic] on said automobile, which representation was false and untrue and was made by said defendant with the fraudulent and felonious intent to deprive said Purity Dairies Employees Federal Credit Union, a federally chartered credit union of its property and thereby caused

the said Robert E. Worrall to rely on said false and fraudulent representation and to deliver said unincumbered title to said automobile to said defendant, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State of Tennessee

Thomas H. Shriver,
Attorney - General